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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1290

GREAT WESTERN BROADCASTING CORPORATION, d.b.a. KXTV,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SAN FRANCISCO LOCAL, and NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, LOCAL 55,
Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Intervenors in Opposition to Petition for Writ of Certiorari

NEYHART & GRODIN
DUANE B. BEESON
1035 Russ Building
San Francisco, California
Attorneys for Intervenors

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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STATEMENT OF THE CASE

The underlying facts, the opinions of the National Labor Relations Board and the court below, and the questions presented in this proceeding are described in the Petition for Writ of Certiorari. American Federation of Television

and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55 were the respondent labor organizations against which the charge and complaint were filed in the case before the Board, and were Intervenors in the court below.

It is the position of Intervenors that the complaint was properly dismissed by the Board, and that the petition to review and set aside the Board's order was correctly denied by the court below. Accordingly, Intervenors oppose the granting of the Petition for Writ of Certiorari. The Board has presented in its decisions and in its briefs below a full statement of its reasons for construing the so-called "publicity proviso" in Section 8(b)(4) of the Act to protect Intervenors' activity which the complaint alleges to be an unfair labor practice, and Intervenors will defer to the Board for a statement of those reasons in opposition to the present petition. This brief is filed to record Intervenors' agreement with the Board's view on the statutory interpretation question, and to state additional reasons for denying the writ.

REASONS FOR DENYING THE WRIT

1. The court below rested its decision on this Court's interpretation of the publicity proviso in Section 8(b)(4) of the Act as stated in *National Labor Relations Board v. Servette, Inc.*, 377 U.S. 46, and *National Labor Relations Board v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58. Petitioner's argument that these decisions are not controlling in the present case is premised on an unnaturally restrictive reading of the Court's opinions. The unexpressed qualifications which Petitioner implies in the Court's language, in order to accommodate Petitioner's effort to distinguish the present case, cannot be squared with the express awareness in the *Servette* opinion of the circumstances

of the present case. See 377 U.S. at 55, 56. In short, the decision below reflects a straightforward application of the principles stated in *Servette* and *Fruit & Vegetable Packers, Local 760* with respect to a factual situation of which this Court was cognizant when it formulated those principles. There is no contrary judicial authority. Petitioner's suggestion that denial of certiorari in this case precludes the possibility of future opportunity for judicial consideration of the problem does not take into account the amenability of Section 303 of the Act to suits premised on analogous factual situations, wholly independent of the Board's role in the administration of Section 8(b)(4). Under the circumstances, Petitioner has not made a showing that the decision below warrants review by this Court.

2. In reading this Court's opinions in *Servette* and *Fruit & Vegetable Packers* to require dismissal of the complaint in the present case, the court below has properly avoided a result which would be in conflict with the protection given by the First Amendment of the Constitution to the peaceful circulation of handbills. Oral and written appeals, unaccompanied by picketing, for consumer support in a boycott program is constitutionally protected. Compare, *United States v. Hutcheson,* 312 U.S. 219, 243; *Lowell v. Griffin,* 303 U.S. 444, 452; *Thomas v. Collins,* 323 U.S. 506; *Talley v. California,* 362 U.S. 60; *National Labor Relations Board v. Fruit & Vegetable Packers, Local 760,* 377 U.S. 58, 63. The handbilling in the present case fully qualifies for this protection, since it neither sought disobedience of law, nor exerted coercive pressure upon the recipients of the handbills. The handbills simply identified firms which continued to advertise on the television station with which Intervenors had a labor dispute, and requested the public to exercise a voluntary choice to withhold patronage from such firms. The circumstance that economic pressure on such firms

may result from public reaction to the dissemination of facts and opinions respecting the labor dispute is scarcely sufficient to disqualify such dissemination from the protection of the First Amendment. Cf. *Thomas v. Collins,* 323 U.S. 516, 537; *Terminiello v. Chicago,* 337 U.S. 1, 4. In short, Congress cannot constitutionally deny unions the right to identify to the public businesses which trade with employers involved in labor disputes, and Section 8(b)(4)(ii)(B) of the Act cannot, therefore, validly be interpreted to prohibit the handbilling activity in this case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

NEYHART & GRODIN
DUANE B. BEESON
Attorneys for Intervenors

May, 1966.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1290

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 2a–6a) is reported at 356 F. 2d 434. Its earlier opinion (Pet. 17a–32a) is reported at 310 F. 2d 591. The original and supplemental decisions and orders of the Board (Pet. 33a–40a, 7a–15a) are reported at 134 N.L.R.B. 1617 and 150 N.L.R.B. No. 46.

JURISDICTION

The decree of the court of appeals (Pet. 1a) was entered on February 9, 1966, and the petition for certiorari was filed on May 6, 1966. The juris-

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diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 8(b)(4)(B) of the National Labor Relation Act (29 U.S.C. 158 (b)(4)(B)) forbids a union to strike or otherwise coerce a neutral employer for the purpose of forcing him to cease doing business with an employer with whom the union has a primary dispute, but exempts "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer * * *." In the present case the union's primary dispute was with a television station. The question presented is whether the union, in appealing, by handbills and related means, to members of the public not to patronize persons who continued to advertise on the station, was engaged in publicity exempted by the statute.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 141, *et seq.*), are printed at pp. 41a–42a of the petition for certiorari.

STATEMENT

KXTV operates a television station in Sacramento, California. In September 1960, a concededly primary dispute between KXTV and the unions[1] rep-

[1] American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Em-

resenting its employees resulted in a strike against the station and the picketing of its premises. The unions made oral appeals to advertisers who used KXTV to discontinue their patronage of the station, sent letters to advertisers advising them of the background of the strike and warning them of adverse economic reaction if they continued to use the station; and printed and distributed 4,000 handbills listing KXTV as "unfair" and naming several companies as advertisers who continued to utilize KXTV. These handbills were distributed in front of KXTV, at the Sacramento Labor Temple, and at various grocery stores which handled products of the companies in question.[2]

Upon charges filed by KXTV, the General Counsel of the National Labor Relations Board issued a complaint against the unions alleging that they had threatened, coerced, or restrained the advertisers for the purpose of forcing them to discontinue business relations with KXTV, and thereby violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act. The Board found that all of the conduct (other than the mere request that neutrals not advertise on KXTV) constituted threats, coercion or restraint within the meaning of the statute. But it also found that such conduct constituted "publicity, other than

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ployees and Technicians, Local 55. These unions, respondents before the Board, intervened in the court of appeals proceedings.

[2] The unions also sent letters to the San Francisco Labor Council asking it and the members of its affiliated unions to turn in their Shell credit cards (Shell being an advertiser on KXTV), listing 14 companies who were then advertising on KXTV and soliciting "any aid" the Council and the members

picketing," within the meaning of the publicity exemption of the statute ([redacted] n. 5 *infra*), and hence was privileged.[3] Accordingly, the Board dismissed the complaint. (Pet. 10a–15a.) The court of appeals sustained the Board's action, holding that *National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46, warranted the Board in applying the publicity proviso to a dispute where the employer—a television station—was a supplier of intangible services (Pet. 2a–6a).[4]

ARGUMENT

The sole question here is whether a television station, as a supplier of advertising services, may be regarded as a producer of "a product or products" "distributed by" other employers, within the meaning of the publicity proviso[5] to Section 8(b)(4)(B)

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of its affiliates "can give"; and threatened two advertisers with naming them in a new leaflet unless they discontinued using KXTV. (Pet. 9a–10a, 34a–37a.)

[3] There was no picketing at the places of business of any of the advertisers, and no work stoppages as a result of the publicity (Pet. 36a).

[4] The Board's order was originally reviewed prior to the decision of this Court in *Servette*, and the court of appeals had then interpreted the proviso as applying only to the manufacturer or processor of a physical product and had set aside the Board's dismissal of the complaint (Pet. 17a–32a). While the case was pending before the Board on remand from the court, the decision in *Servette* was handed down, and the Board, in reliance on that and a related decision (*National Labor Relations Board* v. *Fruit & Vegetable Packers* (*Tree Fruits*), 377 U.S. 58), reaffirmed its original decision. On judicial review of the Board's second order, the court of appeals overruled its earlier decision and sustained the Board.

[5] As pertinent here, the proviso reads:

"That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit

of the National Labor Relations Act (the secondary boycott provision). Applying the principles of this Court's recent decision in *National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46, the Board and the court below held that a supplier of services is within the scope of the proviso. We submit that this result is correct and that further review is not warranted.

The issue in *Servette* was whether the proviso permitted a union that had a dispute with a wholesale distributor to pass out handbills at retail stores requesting the public not to purchase items distributed by the wholesaler. The Court held it did, stating (377 U.S. at 55):

> The proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded. * * * It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. * * * There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.

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publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer * * *."